

Internal Revenue Service

memorandum

TL-N-4407-88

CC:TL:TS/MAKEYES

date: **15 JUN 1988**

to: District Counsel, Baltimore NA: BAL

from: Director, Tax Litigation Division CC: TL

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subject: Consents and Barred Years

This memorandum is in response to your request of March 8, 1988, regarding the issue of whether it is proper to use a closing agreement to obtain a waiver of the statute of limitations when the statutory period has already expired.

Conclusion

We agree with your conclusion that the use of Form 906 to reopen a barred year is improper. As you noted, the statute under section 6501 is clear that an agreement must be executed by both parties before the expiration of the period for assessment.

Facts

Apparently the Baltimore District may be using a modification of Form 906, closing agreement to obtain a waiver of the statute of limitations when the statutory period has already expired. It appears that this practice is primarily being used in shelter cases. The specific language of concern in these cases is as follows:

The parties have resolved an issue as to the assessability and collectibility of a deficiency for this year(s) and the taxpayers agree, notwithstanding the periods of limitations on assessment and collection, to the assessment and collection of this deficiency with interest as set forth in this agreement.

The taxpayer(s) also specifically waive the benefit of any statutory or regulatory provisions which in the absence of this closing agreement, might preclude the assessment and collection of these amounts

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and interest thereon, and agree that after the assessment and collection of these amounts neither these amounts nor any amounts previously assessed with respect to the income tax liability for this issue are refundable or creditable, except as provided in this agreement. . . [emphasis supplied]

#### Discussion

A closing agreement can not be used to obtain a waiver of the statute of limitations when the statutory period has already expired. As you noted, section 6501(a) provides a 3 year period of limitations for assessment. The period of limitations can be extended by a consent, pursuant to section 6501(c)(4) which provides:

Extension by Agreement - Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the state tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing before the expiration of the period agreed upon.

The plain language of this section makes it clear that the period of limitations can not be extended by a consent, unless the consent is executed prior to the expiration of the period of limitations. Therefore, any agreement extending the period of limitations once it has already expired is moot.

Furthermore, the code provides for a refund or abatement of any amount assessed or collected after expiration of the statutory period. Section 6401 provides that any amount of a payment of any Internal Revenue tax which is assessed or collected after the expiration of the period of limitation is an "overpayment". The Secretary is authorized to abate the unpaid portion of the assessment of any tax which is assessed after the expiration of the period of limitations properly applicable to such tax. See I.R.C. 6404(a)(2).

In Diamond Gardner Corporation, Transferee v. Commissioner, 38 T.C. 875, 879-881 (1962), the Court noted that the effect of the statute of limitations is "for all practical purposes" to extinguish a barred tax liability. In arriving at this conclusion, the Court went through the legislative history of the statute of limitations.

One of the earlier sections on the statute of limitations, section 1106 was enacted by the Revenue Act of 1926. Section 1106(a) provided that:

The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the tax liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Although the language of the statute provided that the liability would be extinguished, there were still doubts regarding the effect of the bar of the statute of limitations when payments were made voluntarily. There was also question of whether a taxpayer could recover amounts paid after the statutory period if he owed that amount. To alleviate these doubts Congress enacted sections 607-609 of the Revenue Act of 1928, retroactively repealing section 1106.

Section 607 dealt with the effect of the expiration of the period of limitations against the government. It provided that any tax assessed or paid after the expiration of the period of limitations shall be considered an overpayment. The legislative history of section 607 found in S. Rep. No. 960, 70th Cong., 1st Sess, points out that it is immaterial whether the payment was voluntary or involuntary, duress is of no significance in determining the right to recover an amount paid after the statute has run. Section 6401(a) is similar to section 607 of the 1926 Act.

In Diamond Gardner, the Court held "any payment by a taxpayer of a barred tax liability whether voluntary or involuntary, automatically becomes an 'overpayment' and hence subject to mandatory refund." The Service has taken a slightly different position on whether any payment made after the statute of limitations has expired is an "overpayment" and subject to mandatory refund. As discussed in G.C.M.s 33320 and 33176, and later clarified in G.C.M. 33699, the Service's position is that **any voluntary payments made after the statute has expired, and pursuant to a closing agreement or an amended return, are not refundable.** This position appears to be based upon a paragraph of the legislative history of section 607. In the Senate Finance Committee Report, it states that, "neither section 607 or section

608 applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new bill."

G.C.M. 33369 clarifies G.C.M. 33320 by pointing out that the earlier G.C.M.'s holding was based upon the assumption that the payment was voluntary and a closing agreement was executed. G.C.M. 33699 distinguishes Diamond Gardner from the situation described in G.C.M. 33320. In Diamond, the Commissioner sought to collect a tax liability; there was no voluntary remittance by the taxpayer as in G.C.M. 33320. However, G.C.M. 33369 comes to the conclusion that a closing agreement should not be used to attempt to obtain payment for any barred years. It provides:

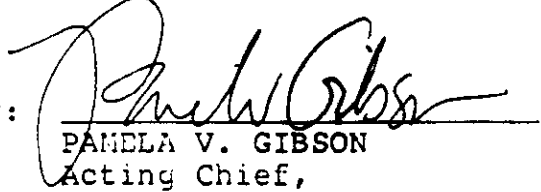
the net effect of the Code provisions, the cases and Chief Counsel letters approved in G.C.M. 33176 is to suggest substantial doubt that the Commissioner could assess and collect the tax liability determined by a closing agreement executed subsequent to the expiration of the period of limitations on assessment.

We do not believe an argument should be made that a taxpayer can waive his right to a statutory protection the code provides, unless there is a provision in the code to do so. For example, section 6213(d) allows a taxpayer to waive the restrictions on assessment and collection imposed on the Government by section 6213(a). There is a similar provision in the TEFRA partnership procedures. Section 6225(a) prohibits assessment and collection for 150 days after the notice of final partnership adjustment was mailed and if a proceeding is begun in the Tax Court, until that decision is final. Section 6224(b)(1)(B) allows a partner to waive this restriction. There is no provision waiving the limitations on assessment for section 6501(a) or section 6229(a). The period of limitations can be extended but not waived. Therefore, a closing agreement waiving the period of limitations for assessment should not be used for years barred by the statute of limitation.

Should you have any questions regarding this memorandum, please contact Marsha Keyes at FTS 566-4174.

MARLENE GROSS

By:

  
PAMELA V. GIBSON  
Acting Chief,  
Tax Shelter Branch